STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 3, 2005
v	No. 252842 Genesee Circuit Court
ROBERT JAMES THOMAS, Defendant-Appellant.	LC No. 02-009766-FH

Before: Saad, P.J., and Fitzgerald and Smolenski, JJ.

PER CURIAM.

Defendant was charged with ten counts arising out of his participation in a methamphetamine production enterprise, and, pursuant to a *Cobbs*[1] agreement, defendant pleaded guilty to all ten counts. The agreement provided that defendant would be sentenced to two years' imprisonment for each of the two counts of carrying or possessing a firearm while committing or attempting to commit a felony (felony-firearm), MCL 750.227b, and to a minimum sentence of five years or less for the most serious methamphetamine offense.[2] Furthermore, the minimums for the remaining offenses would not exceed the five-year minimum for the most serious offense. Finally, the felony-firearm sentences would run concurrent to each other, but consecutive to and before the remaining charges, which would run concurrently to each other.[3] After taking defendant's plea, the trial court sentenced defendant according to the *Cobbs* agreement. Defendant then filed a delayed application for leave to appeal with this Court, which was denied for lack of merit on the grounds presented.[4] Defendant then appealed to our

[1] *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

[2] The most serious methamphetamine offense charged was for owning, possessing, or using a vehicle, building, structure, place, or area that defendant knew or had reason to know was to be used as a location to manufacture methamphetamine, MCL 333.7401c(1)(a), which violation involved the possession, placement, or use of a firearm or other device designed or intended to be used to injure another person, MCL 333.7401c(2)(e). This offense carries a maximum penalty of 25 years' imprisonment. MCL 333.7401c(2)(e).

[3] Consequently, under the agreement, defendant would have to serve a minimum of seven years in prison.

Supreme Court, which, in lieu of granting leave to appeal, remanded to this Court for consideration as on leave granted. *People v Thomas*, 469 Mich 979; 673 NW2d 753 (2003). We affirm.

I. Double Jeopardy Issues

Defendant first contends that the trial court violated the double jeopardy clauses of both the United States and Michigan constitutions[5] when it punished him three times for owning and operating the same methamphetamine laboratory and twice for the same assault. We disagree.

A. Standard of Review

Although the double jeopardy issues are raised for the first time on appeal, this Court will address the issues "regardless of whether the defendant has raised the issue before the trial court because it involves a 'significant constitutional question.'" *People v Colon*, 250 Mich App 59, 62; 644 NW2d 790 (2002), quoting *People v Lugo*, 214 Mich App 699, 705; 542 NW2d 921 (1995). This Court reviews de novo a challenge based upon double jeopardy. *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004).

B. Double Jeopardy and Waiver

Because defendant pleaded guilty to each of the offenses whose sentences he now claims violated his right not to be subjected to multiple punishments for the same offense, we must, as a preliminary matter, determine how his plea affects our double jeopardy analysis.

A defendant can waive the protections afforded by the double jeopardy clause of the United States Constitution. *Ricketts v Adamson*, 483 US 1, 8-12; 107 S Ct 2680; 97 L Ed 2d 1 (1987). While this Court has held that a guilty plea does not, by itself, waive a defendant's right to raise a double jeopardy issue on appeal, *People v Feazel*, 219 Mich App 618, 621; 558 NW2d 219 (1996), rev'd 456 Mich 855 (1997), our Supreme Court has subsequently held that a guilty plea "waives a defendant's double jeopardy claim if the court must rely on evidence outside the guilty plea record to determine the merits of his claim." *People v Denio*, 454 Mich 691, 705 n 16; 564 NW2d 13 (1997), citing *US v Broce*, 488 US 563, 575-576; 109 S Ct 757; 102 L Ed 2d 927 (1989).[6]

In *Broce*, the defendant pleaded guilty to two counts of conspiracy to rig bids on two different highway construction projects. *Broce*, *supra* at 565. After the respondents had entered

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[4] See *People v Thomas*, unpublished order of the Court of Appeals, entered June 16, 2003 (Docket No. 260168).

[5] US Const, Am V (". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ."); Const 1963, art 1, § 15 ("No person shall be subject for the same offense to be twice put in jeopardy.").

[6] In *Feazel*, our Supreme Court reversed the decision of this Court and remanded the case for reconsideration in light of footnote 16 in *People v Denio*, 454 Mich 691, 706 n 16; 564 NW2d 13 (1997). See *People v Feazel*, 456 Mich 855; 568 NW2d 676 (1997).

their plea and been sentenced, they filed a motion to have the charge contained in the second indictment vacated. Respondents contended that the bid-rigging schemes alleged in their indictments were part of a single conspiracy and, therefore, their convictions violated their double jeopardy rights. *Id.* at 567. The *Broce* Court rejected respondents' argument holding that respondents could not collaterally attack their conviction and plea. *Id.* at 569. The *Broce* Court stated that "when the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary. If the answer is in the affirmative then the conviction and the plea, as a general rule, foreclose the collateral attack." *Id.* However, the Court did note that "[t]here are exceptions where on the face of the record the court had no power to enter the conviction or impose the sentence," but found those exceptions inapplicable under the facts of the case. *Id.* at 569-570. The Court reasoned, "[j]ust as a defendant who pleads guilty to a single count admits guilt to the specified offense, so too does a defendant who pleads guilty to two counts with facial allegations of distinct offenses concede that he has committed two separate crimes." *Id.* at 570. The Court further noted that the respondents "had the opportunity, instead of entering their guilty pleas, to challenge the theory of the indictments and to attempt to show the existence of only one conspiracy in a trial-type proceeding. They chose not to, and hence relinquished that entitlement." *Id.* at 571.

In this case, defendant does not argue that his plea was involuntary or that he was deprived of the assistance of counsel. Therefore, defendant's claim can only succeed if, on the face of the information and plea record, it appears that the trial court was without the authority to convict and sentence him.

Defendant was charged with three counts related to his participation in the production of methamphetamine. Count one of the information charged defendant with owning, possessing, or using a vehicle, building, structure, place, or area that he knew or had reason to know was to be used as a location to manufacture methamphetamine, MCL 333.7401c(1)(a), which violation involved the possession, placement, or use of a firearm or other device designed or intended to be used to injure another person, MCL 333.7401c(2)(e). Count two alleged defendant owned or possessed a chemical or laboratory equipment that he knew or had reason to know was to be used for the purpose of manufacturing methamphetamine, MCL 333.7401c(1)(b), within 500 feet of a residence, business establishment, school property, or church or other house of worship, MCL 333.7401c(2)(d). Count three alleged defendant provided a chemical or laboratory equipment to another person knowing or having reason to know that the other person intended to use that chemical or laboratory equipment for the purpose of manufacturing methamphetamine. MCL 333.7401c(1)(c); MCL 333.7401c(2)(a). While it is not explicitly clear that these three counts refer to separate offenses, the information could be read to refer to three separate crimes and, therefore, is not facially invalid.[7] Furthermore, the facts pleaded by defendant at the plea hearing may fairly be read to support counts one through three as separate and distinct offenses.

[7] In *Broce* the United States Supreme Court stated that the "Court of Appeals erred in concluding that because the indictments did not explicitly state that the conspiracies were separate, respondents did not concede their separate nature by pleading guilty to both." *Broce*, *supra* at 570. While the information in this case is susceptible to varying interpretation, we believe that
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At defendant's plea hearing, both parties agreed that counts one through three referred to events that occurred at the same location. In addition, the trial court described counts one through three as operating or maintaining a laboratory for the purpose of manufacturing methamphetamine and added the additional elements of possessing a gun to count one and operating within 500 feet of a specified location to count two. From this portion of the record, it might appear that the first three counts all refer to a single offense that occurred over a period of time. However, defendant also told the trial court that he mainly worked on motorcycles in his garage and that "anytime that anything [i.e. methamphetamine] was made there, it was just – there was no lab, per se. It just – it was somethin' that you just did it and then it was over and done." In addition, the trial court asked defendant "How is it that you started this lab? Was it your idea? Whose idea was it?" Defendant responded, "it depends on which time." Defendant then explained that "there was never a lab there like on a constant basis." Defendant further stated that various people manufactured methamphetamine in his garage over a period of time. In addition to providing the location, defendant admitted that he attempted to manufacture methamphetamine in his garage and that he provided chemicals for the production of methamphetamine. From these facts, it cannot be said that counts one through three punish a single offense. Likewise, the information can fairly be construed to refer to three separate offenses. As a result, defendant cannot demonstrate that his double jeopardy rights have been violated on the plea record alone, see *Denio*, *supra* at 705-706 n16, and by his guilty plea, defendant has conceded that he committed the charged offenses. *Broce*, *supra* at 570.

The same logic applies to defendant's claim that he was impermissibly punished twice for the same assault. Count eight of the information charged defendant with assaulting Kenneth Appel with intent to do great bodily harm less than murder, MCL 750.84, and count nine charged defendant with assaulting the same victim with a dangerous weapon, MCL 750.82. While the charges, as stated in the information, could refer to the same assault, in the plea record, defendant admitted to pointing a gun at Appel and threatening to kill him and admitted to taking a gear shift knob and hitting him over the head. Therefore the facts also support the contention that defendant was charged with two distinct assaults.[8]

Because this Court will not go outside the plea record and information to address the merits of defendant's double jeopardy claims, and the record and information do not present a facial violation of double jeopardy, defendant's double jeopardy claims must fail.[9]

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the record as a whole supports the conclusion that defendant conceded that the charges were separate offenses. See *id.* at 571 n *.

[8] See *People v Lugo*, 214 Mich App 699, 708-709; 542 NW2d 921 (1995) (holding that a defendant who assaulted an officer with a broom stick and then pulled the officer's firearm and assaulted him with that, could properly be convicted and sentenced for two separate assaults without violating the defendant's double jeopardy rights, because the felonious assault was completed before the act leading to the assault with intent to do great bodily harm).

[9] Because defendant's claims are foreclosed by his guilty plea, we need not engage in a legislative intent analysis of MCL 333.7401c(1) to determine whether the legislature intended to have multiple penalties for the same offense. See *Denio*, *supra* at 709 (noting that the legislature may authorize multiple penalties for the same offense, but that courts may not impose more

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II. Departure from Sentencing Guidelines

Defendant next contends the trial court erred when it departed from the sentencing guidelines by sentencing him to serve time in prison for maintaining a drug house and felonious assault without articulating a substantial and compelling reason for the departures. Defendant argues that, as a result of this error, this Court must remand this case for resentencing. Because defendant failed to raise this issue before the trial court, this Court will review it for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-763; 597 NW2d 130 (1999).

A trial court must impose intermediate sanctions where the upper limit of the recommended sentence range is eighteen months or less, unless the court states on the record substantial and compelling reasons for the departure. MCL 769.34(4); *People v Stauffer*, 465 Mich 633; 640 NW2d 869 (2002). An intermediate sanction does not include a prison term. MCL 769.31(b); *Stauffer*, *supra*. Defendant's minimum sentence range calculated under the guidelines was scored at zero to seventeen months. As a result, the trial court plainly erred when it sentenced defendant to 12 to 24 months' imprisonment for maintaining a drug house and 16 to 48 months' imprisonment for felonious assault without giving a substantial and compelling reason for these departures. However, because defendant was sentenced to a minimum of 60 months' imprisonment on another valid charge, which runs concurrent with the erroneous sentences, defendant suffered no prejudice as a result of the trial court's failure to impose an intermediate sanction.[10] Therefore, there was no error affecting defendant's substantial rights.

III. Scoring OV 14

Defendant also argues that he is entitled to resentencing because the trial court erred when it scored offense variable fourteen (OV 14) at 10 points. We disagree. Defendant bargained for and received substantial concessions from the trial court on his sentences in exchange for his guilty plea.[11] When defendant pleaded guilty and was sentenced in accordance

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punishment than the legislature intended).

[10] Indeed, the trial court was not even required to score these offenses. *People v Hill*, 221 Mich App 391, 396; 561 NW2d 862 (1997) ("If sentences are to be served concurrently, there is no reason why a defendant's offenses should be scored separately because all of the defendant's sentences will be served at the same time. The sentence for the most severe offense will encompass the sentences for any lesser offenses.").

[11] In addition to the lenient minimum sentence, the trial court elected not to exercise its discretion to sentence defendant consecutively for his drug offenses. See MCL 333.7401c(5).

with this bargain, he waived his right to challenge the sentences. *People v Blount*, 197 Mich App 174, 176; 494 NW2d 829 (1992).[12] Therefore, there was no error.

Affirmed.

/s/ Henry William Saad
/s/ E. Thomas Fitzgerald
/s/ Michael R. Smolenski

[12] Although *Blount* dealt with an agreement between the prosecutor and the defendant, we find the logic of *Blount* applicable in the case of *Cobbs* agreements as well.